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Supreme Court, U.S.
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No. 08-514

In The
Supreme Court of the United States

JOE CLARK MITCHELL,
Petitioner,

v.

JOHN REES, WARDEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit properly rejected petitioner's motion for relief from judgment under Fed.R.Civ.P. 60(b)(6), where his motion was based on simple legal error and no extraordinary circumstances.

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The January 9, 2008, panel opinion of the United States Court of Appeals for the Sixth Circuit, reversing the judgment of the district court, is unpublished. (Pet.App. 1a) The April 20, 2006, memorandum opinion of the district court, which was reversed by the Sixth Circuit, is published at 430 F.Supp.2d 717. (Pet.App. 12a)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner was convicted in 1986 of two counts of aggravated assault, two counts of armed robbery, two counts of aggravated kidnapping, one count of arson, one count of first degree burglary, and two counts of aggravated rape. He was given an effective sentence of four life terms. On direct appeal, the Tennessee Court of Criminal Appeals affirmed all but one of the convictions, reducing one of the aggravated rapes to simple rape, and modifying the sentence on that charge. *State v. Joe Clark Mitchell*, No. 87-152-III, 1988 WL 32362 (Tenn. Crim. App. Apr. 7, 1988), *perm. app. denied* (Tenn. June 27, 1988). Petitioner did not seek certiorari from this Court.

Petitioner subsequently sought post-conviction relief in the trial court, which was denied. That decision was affirmed on appeal. *Joe Clark Mitchell v. State*, No. 01-C01-9007-CC-00158, 1991 WL 1351 (Tenn. Crim. App. Jan. 11, 1991), *perm. app. denied*

(Tenn. Apr. 15, 1991). Petitioner then sought state habeas relief, which was likewise denied. *Joe Clark Mitchell v. State*, No. M2002-03011-CCA-R3-CO, 2003 WL 22243287 (Tenn. Crim. App. Sep. 30, 2003), *perm. app. denied* (Tenn. Dec. 29, 2003). Petitioner did not seek certiorari from this Court of either decision.

Petitioner filed a petition for writ of habeas corpus in the district court in April 1993. An evidentiary hearing was held by a magistrate judge, who issued a Report and Recommendation for denial of the writ. The district court, however, overruled in part the Report and Recommendation and granted the writ on the basis of petitioner's *Batson*[1] claim. Respondent appealed.[2] The Sixth Circuit reversed, holding that the grant of an evidentiary hearing was improper in the absence of any findings of cause and prejudice to overcome petitioner's failure to further develop the factual basis of his claim in the state courts. (Pet.App. 64a) ("*Mitchell I*"). The court specifically found that the state court made findings of fact relative to the *Batson* claim based on the evidence petitioner presented in the state proceedings and agreed that, on

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[2] On appeal, respondent challenged both the district court's decision to conduct an evidentiary hearing and its decision to grant relief on petitioner's *Batson* claim. *Mitchell v. Rees*, Nos. 95-6232/6397 (6th Cir.). Petitioner's assertion of an "undisputed" *Batson* violation (Pet. 8, 19) is therefore erroneous. In a related vein, petitioner's Statement omits the fact that the evidentiary hearing held on his *Batson* claim was conducted by a magistrate judge (Pet. 5), who concluded that, while petitioner had established a *prima face* case of purposeful discrimination, petitioner had not proven that the prosecutor's race-neutral explanation was pretextual. (Pet.App. 14a, 92a)

the basis of that evidence, petitioner had failed to establish a *Batson* claim. (Pet.App. 77a) The court also found no error in the district court's dismissal of petitioner's ineffective assistance claims, except his claim of ineffective assistance for failing to raise *Batson*, which the court remanded to the district court to allow petitioner the opportunity to demonstrate that he was entitled to an evidentiary hearing under *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). (Pet.App. 81a n.13). This Court denied certiorari. *Mitchell v. Rees*, No. 97-6806 (U.S. Feb. 23, 1998).

On remand, petitioner filed a motion for summary judgment. The magistrate judge filed a report recommending that petitioner's motion for summary judgment be granted and the writ issue. The district court adopted the report, after finding, based on the state court record, that petitioner was denied the effective assistance of counsel due to the failure to raise a *Batson* claim, which the court deemed meritorious. Respondent appealed, and the Sixth Circuit again reversed. (Pet.App. 34a) (*"Mitchell II"*) The court stated that the district court was not free to overrule its prior conclusion regarding the merits of petitioner's *Batson* claim, and remanded "with instructions to the district court to enter judgment denying the petition for a writ of habeas corpus." (Pet.App. 37a) Petitioner did not seek rehearing, and final judgment was entered in the district court on March 14, 2002. This Court denied certiorari. *Mitchell v. Rees*, 537 U.S. 830 (2002).

On December 9, 2005, petitioner filed a motion under Fed.R.Civ.P. 60(b)(6) for relief from the district court's 2002 judgment, alleging error in the Sixth Circuit's 1997 determination that the district court

had erred in conducting an evidentiary hearing. In support of this motion, petitioner relied on the decisions of the Sixth Circuit in *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), and *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005). The district court granted petitioner's motion (Pet.12a) and, adopting the district court's 1995 findings and conclusions on petitioner's *Batson* claim, granted the writ of habeas corpus. (Pet.App. 29a, 33a) Respondent appealed.

The Sixth Circuit reversed. The court held that "[i]t was an abuse of discretion to grant relief under Rule 60(b)(6) because Mitchell's motion should have been brought under Rule 60(b)(1)." (Pet.App. 9a) Construing Mitchell's motion under 60(b)(1), the court held that "it must be denied as untimely filed," as it was not filed within one year after the judgment. (Pet.App. 10a) Petitioner now seeks this Court's review.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT PRESENT A CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

Petitioner asserts that "this case implicates a split among the courts of appeals on the question whether claims of legal error are ever cognizable under Rule 60(b)(6)." (Pet. 12) Specifically, he contends that the law in the Sixth Circuit in this respect conflicts with that in four other circuits -- the Third, Ninth, Tenth, and Eleventh -- and that his motion would have been

granted in three of these circuits. (Pet. 17)[3] But this is simply not so. The rule in the Sixth Circuit is precisely the same as that in these four circuits.

A. Contrary to Petitioner's Assertion, No Conflict Exists Between the Sixth Circuit and the Third, Ninth, Tenth, and Eleventh Circuits; All of These Circuits Provide for Relief Under Fed.R.Civ.P. 60(b)(6) for Claims of Legal Error Accompanied by Extraordinary Circumstances.

Petitioner cites the Third Circuit case of *Martinez-McBean v. Government of Virgin Islands*, 562 F.2d 908 (3d Cir. 1977), for the proposition that legal error, without more, does not justify granting relief under Fed.R.Civ.P. 60(b)(6), and that extraordinary circumstances are required. (Pet. 18) *See Pridgen v. Shannon*, 380 F.3d 721, 728 (3d Cir. 2004). Petitioner cites the Ninth Circuit case of *In re International Fibercom, Inc.*, 503 F.3d 933 (9th Cir. 2007), for the proposition that legal error accompanied by extraordinary circumstances would justify relief from judgment under Rule 60(b)(6). (Pet. 17). In the Tenth Circuit case of *Van Skiver v. United States*, 952 F.2d 1241 (10th Cir. 1991), which petitioner cites in a footnote (Pet. 19 n.5), the court observed that "legal error that provides . . . extraordinary circumstances" would justify relief under Rule 60(b)(6). *Id.*, 952 F.2d at 1244. Lastly, petitioner cites two Eleventh Circuit

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[3] Petitioner does not contend that he would have prevailed in the Tenth Circuit, owing to that circuit's interpretation of what constitutes sufficiently extraordinary circumstances. (Pet. 19 n. 5)

cases, *Rice v. Ford Motor Co.*, 88 F.3d 914 (11th Cir. 1996), and *Scott v. Singletary*, 38 F.3d 1547 (11th Cir. 1994), for the proposition that a mere error of law is insufficient to obtain relief under Rule 60(b)(6) and that sufficiently extraordinary circumstances are required. (Pet. 18)

The law of the Sixth Circuit is in complete accord. In *Pierce v. United Mine Workers of Am. Welfare & Ret. Fund for 1950 & 1954*, 770 F.2d 449 (6th Cir. 1985), the Sixth Circuit found that the "plaintiff's fundamental basis for his 60(b) motion [was] a claim of legal error" and held: "[b]ecause of the residual nature of Rule 60(b)(6), a claim of *simple* legal error, *unaccompanied by extraordinary or exceptional circumstances*, is not cognizable under Rule 60(b)(6)." 770 F.2d at 451 (emphasis added).[4] In *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291 (6th Cir. 1989), the Sixth Circuit observed: "[a] claim of *strictly* legal error falls in the category of 'mistake' under Rule 60(b)(1) and thus is not cognizable under Rule 60(b)(6) *absent exceptional circumstances.*" 867 F.2d at 294 (citing *Pierce*, 770 F.2d at 451) (emphasis added). *See id.*, 867 F.2d at 294 (Rule 60(b)(6) may be used as a means of achieving "substantial justice" when "something more" than one of the grounds contained in the first five clauses is present). The proposition that "[a] claim of strictly legal error . . . is not cognizable under 60(b)(6) *absent extraordinary circumstances*" was restated by the Sixth Circuit in *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574, 578 (6th Cir. 1998) (quoting *Hopper*, 867 F.2d at 294) (emphasis added). *See also United States v.*

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[4] *Pierce* is cited in the panel opinion in petitioner's case. (Pet.App. 10a)

Foley, 110 Fed.Appx. 611, 614 (6th Cir. 2004) ("Rule 60(b)(6) cannot provide relief for legal error absent other exceptional or extraordinary circumstances") (citing *Hopper*, 867 F.2d at 294).

Petitioner cites none of these cases.[5] And the cases he does cite are likewise in accord or are inapposite. (Pet. 13) In *Harbison v. Bell*, 503 F.3d 566 (No. 06-6539) (6th Cir. 2007), *cert. denied*, 128 S.Ct. 1479 (2008), where the Sixth Circuit held that a habeas petitioner's motion for relief from judgment under Rule 60(b)(6), which alleged "legal error or mistake" by the district court and the court of appeals, was more properly brought under Rule 60(b)(1), the court expressly held that the motion was "not sufficient to meet the high standard required for 60(b)(6) relief." 503 F.3d at 569. *See id.*, 503 F.3d at 570 (Harbison has not demonstrated that an adequate issue exists concerning whether extraordinary circumstances are present to justify relief). And neither *McCurry ex rel. Turner v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586 (6th Cir. 2002), nor *McDowell v. Dynamics Corp. of America.*, 931 F.2d 380 (6th Cir. 1991), which petitioner cites in a footnote (Pet. 13 n.2), involved allegations of legal error. Moreover, in both of these cases, the Sixth Circuit reiterated that relief under Rule 60(b)(6) required a showing of extraordinary circumstances and held that "straightforward claims of attorney error and strategic miscalculation," *McCurry*, 298 F.3d at 595, and claims of court-reporter mistake and attorney misconduct, *McDowell*, 931 F.2d

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[5] Petitioner does cite *Pierce*, but only in a parenthetical to another case cited in a footnote regarding a different point altogether. (Pet. 14 n.3)

at 384, did not provide adequate grounds for relief under 60(b)(6). Thus, contrary to petitioner's claim, there exists no split of authority between the Sixth Circuit and these other circuits on this question.[6]

B. The Sixth Circuit Properly Held That Petitioner's Motion Was Not Cognizable Under Rule 60(b)(6); His Motion Was Based on a Claim of Legal Error That Was Not Accompanied by Extraordinary Circumstances.

In petitioner's view, the decision of the Sixth Circuit in this case not only fails to follow Sixth Circuit precedent but stands this precedent on its head. He claims that "the Sixth Circuit categorically held that because [his] motion for relief from judgment was based in part on legal error, it was cognizable only under Rule 60(b)(1), notwithstanding [the existence of extraordinary circumstances]." (Pet. 12) But the panel below, having declined to designate its opinion for publication, apparently did not share the view that its opinion "alter[ed] or modifie[d] an existing rule of law."

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[6] There *does* appear to exist a split of opinion among the circuits on the question whether claims of legal error are cognizable *under Rule 60(b)(1). See, e.g., Paige v. Schweiker*, 786 F.2d 150, 154 (3d Cir. 1986) ("some courts have held that legal error, without more, cannot be corrected under Rule 60(b). . . . Others have held that legal error may be characterized as 'mistake' within the meaning of 60(b)(1)"). But while petitioner references such a split (Pet. 15-16), he does not claim that it is implicated by this case. And it is not. As reflected above, the Sixth Circuit is among those circuits that recognize pure legal error as a "mistake" under Rule 60(b)(1). Accordingly, petitioner's motion was not denied because it was not cognizable under 60(b)(1) but because it was not timely under this clause of the Rule.(Pet.App. 10a)

6th Cir.R. 206 (a)(1). Indeed, petitioner's view is based on a misconstruction, if not distortion, of the Sixth Circuit opinion. The Sixth Circuit held that petitioner's motion was cognizable only under Rule 60(b)(1) because it was based on legal error – not because it was based "in part" on legal error. While the Sixth Circuit may not have held expressly that petitioner's motion did not present extraordinary circumstances, it did do so impliedly.

The Sixth Circuit recognized at the outset of its analysis that "Rule 60(b)(6) is interpreted narrowly, permitting relief only in 'extraordinary circumstances.'" (Pet.App. 8a)[7] Noting that petitioner's motion alleged that the decision in *Mitchell I* "was 'totally wrong' and the court made a 'patent error in denying an evidentiary hearing,'" the Sixth Circuit determined: "it is clear that [petitioner's] Rule 60(b) motion alleges a mistake made by this court in *Mitchell I*." (Pet.App. 9a, 10a) Citing the Sixth Circuit's decision in *Pierce*, 770 F.2d 449, for the proposition that "a claim of legal error is subsumed in the category of mistake under Rule 60(b)(1)," the court went on to hold that the district court abused its discretion by granting relief under Rule 60(b)(6). (Pet.App. 10a) (citing *McCurry*, 298 F.3d at 595-596) As discussed above, however, *Pierce* also established the Sixth Circuit rule that "simple claims of legal

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[7] The Sixth Circuit had already determined that petitioner's motion was not a successive habeas petition (Pet.App. 8a), and that it was proper for the district court to entertain a Rule 60(b) motion that challenged a judgment of the Sixth Circuit (Pet.App. 6a (citing, *inter alia*, *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 18 (1976)) Respondent assumes *arguendo* that these determinations were correct.

error" that are not accompanied by extraordinary circumstances are not cognizable under Rule 60(b)(6). And *McCurry* held that "straightforward" claims of error that are cognizable under Rule 60(b)(1) do not present extraordinary circumstances sufficient for relief under Rule 60(b)(6). By deciding, then, that petitioner's motion alleged a claim of legal error cognizable under Rule 60(b)(1), the Sixth Circuit also decided, by necessary implication, that petitioner's claim was one of "simple legal error, unaccompanied by extraordinary or exceptional circumstances." *Pierce*, 770 F.2d at 451.

This implied holding was quite correct -- there *are* no extraordinary circumstances. This Court has previously observed that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997). And in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court observed that the extraordinary circumstances necessary to justify relief under Rule 60(b)(6) "will rarely occur in the habeas context." 545 U.S. at 535. The Court went on to hold in that case that, after a federal district court had decided a procedural question under then-existing Eleventh Circuit precedent, "[i]t was hardly extraordinary that subsequently, . . . this Court arrived at a different interpretation." 545 U.S. at 536. It was likewise "hardly extraordinary" for the Sixth Circuit, subsequent to its decision in *Mitchell I*, to arrive at a different interpretation of the law, in *Abdur'Rahman*, 226 F.3d 696, regarding evidentiary hearings in habeas cases.

Furthermore, as in *Gonzalez*, the decision in *Abdur'Rahman* "is all the less extraordinary . . . because of [petitioner's] lack of diligence in pursuing review of the [evidentiary hearing] issue." *Gonzalez*, 545 U.S. at 537. Petitioner filed his Rule 60(b)(6) motion in December 2005 – more than three years after his habeas judgment became final, and more than five years after *Abdur'Rahman* was decided. And quite apart from his delay in filing a Rule 60(b) motion,[8] precisely because the appeal in his habeas case was still pending when *Abdur'Rahman* was decided, petitioner could have reasserted the hearing issue in the Sixth Circuit at that time.[9] He did not, and his failure to do so, coupled with his delay in filing his Rule 60(b) motion, belies his claim that he "diligently sought relief at every turn as soon as he was able to do so." (Pet. 25)

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[8] Petitioner contends that he could not have sought Rule 60(b) relief any sooner, because he was precluded by Sixth Circuit precedent that deemed such motions second or successive petitions. (Pet. 26) But this contention is largely self-serving. Sixth Circuit precedent did not stop the prisoner in *Abdur'Rahman* from filing a Rule 60(b) motion in both 2001 and again in 2002. *See In re Abdur'Rahman*, 392 F.3d 174, 178 (6th Cir. 2004), *vacated, Bell v. Abdur'Rahman*, 545 U.S. 1151 (2005). Nor did similar Eleventh Circuit precedent stop the prisoner in *Gonzalez* from filing a Rule 60(b) motion. *See Gonzalez.*, 545 U.S. at 527.

[9] In September 2000, when *Abdur'Rahman* was decided, briefing had been completed in the habeas appeal, but oral argument had not yet been conducted. *See Mitchell v. Rees*, No. 99-5838 (6th Cir.).

II. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner also asserts that the decision of the Sixth Circuit was "wrong on the merits" because it "cannot be reconciled with [this Court's] precedents" (Pet. 25), citing the decisions in *Gonzalez*; *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *Ackermann v. United States*, 340 U.S. 193 (1950); and *Klapprott v. United States*, 335 U.S. 601 (1949). He says that "[these] precedents confirm that Rule 60(b)(6) relief is available for claims of legal error accompanied by extraordinary circumstances." (Pet 21) *See* Pet. 12.

But as discussed above, Sixth Circuit precedent confirms the same thing. *See Hopper*, 867 F.2d at 294, *Pierce*, 770 F.2d at 451. And as further discussed above, the Sixth Circuit decision in this case followed that precedent. Indeed, the Sixth Circuit cited *Liljeberg* in the course of its analysis under Rule 60(b)(6). (Pet.App. 9a) Petitioner's Rule 60(b)(6) motion was properly rejected, because it presented strictly legal error and no extraordinary circumstances. *See Ackermann*, 340 U.S. at 197, 202 (motion seeking relief from allegedly erroneous judgment properly denied as untimely under Rule 60(b)(1); circumstances not so extraordinary as to warrant relief under 60(b)(6)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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